

THE HONORABLE RICARDO S. MARTINEZ

U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

THOMAS E. PEREZ, Secretary of Labor,
United States Department of Labor,

Plaintiff,

vs.

LANTERN LIGHT CORPORATION, d/b/a
ADVANCED INFORMATION SYSTEMS, a
corporation; DIRECTV LLC, a limited liability
company; and RAMON MARTINEZ, an
individual,

Defendants.

NO. 2:12-CV-01406-RSM

**INTERVENOR'S MOTION TO
UNSEAL SUMMARY JUDGMENT
EXHIBITS**

Note on Motion Calendar: April 21, 2017

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

This motion to unseal is filed on behalf of the the Washington Wage Claim Project (“WWCP”), a public interest organization dedicated to representing low-wage workers who have suffered wage and hour violations. The WWCP seeks public access to court records that were sealed in violation of the public’s presumptive right of access to court records—a right protected by both the common law and the First Amendment. *See Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978); *Courthouse News Serv. v. Planet*, 750 F.3d 776, 787-78 (9th Cir. 2014); *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006). As set forth in the accompanying Motion to Intervene, the WWCP reviewed the record in this case and believes there is a strong public interest in exposing the sealed exhibits to the light of day.

It is well established that summary judgment pleadings are presumptively open to the public. *See United States v. Bus. of Custer Battlefield Museum & Store*, 658 F.3d 1188, 1194-95 (9th Cir. 2011); *Kamakana*, 447 F.3d at 1178; *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003). The fact that these pleadings contain exhibits that were marked confidential pursuant to a validly issued protective order is immaterial; where, as here, confidential discovery materials are filed under seal as attachments to a summary judgment motion, they “no longer enjoy protected status ‘without some overriding interest in favor of keeping the discovery of documents under seal.’” *Foltz*, 331 F.3d at 1135-36 (quoting *Rushford v. The New Yorker Magazine*, 846 F.2d 249, 252 (4th Cir. 1988)). Consequently, such pleadings may be sealed only where a party articulates a “compelling reason” for doing so, *Kamakana*, 447 F.3d at 1178, and where a court makes particularized findings that the party’s need for secrecy outweighs the public’s presumptive right of access. *Id.* at 1179.

In this case, it appears that court records were placed under seal without any showing of a compelling need for secrecy or any particularized findings by this Court. The record includes numerous sealed exhibits to the parties’ cross motions for summary judgment, over 20 of which were directly relied on in this Court’s ruling of May 29, 2015. *See* Dkts. # 116 -120, 130, 131,

1 143, 144, 147, and 148. *See also* Declaration of Beth Terrell (“Terrell Decl.”), Ex. 1. Yet, so
2 far as the record reveals, DirecTV never articulated any compelling reason for sealing exhibits
3 to the parties’ summary judgment motions. Nor did this Court make any particularized
4 findings that DirecTV’s need for secrecy outweighed the public’s presumptive right of access.
5 That was error. Unless the requisite showing and findings are made, the records should be
6 unsealed.

7 **II. STATEMENT OF FACTS**

8 This case was brought by Thomas Perez, the Secretary of the United States Department
9 of Labor (“the Department”), on behalf of 82 installers formerly employed by Lantern Light
10 Corporation d/b/a Advanced Information Systems (“AIS”). *See* Dkt. # 158 at 1-2. In 2011,
11 AIS contracted to provide satellite installation and upgrade services exclusively for DirecTV.
12 *Id.* The Department filed suit, alleging AIS and DirecTV violated the Fair Labor Standards Act
13 of 1938 (“FLSA”), 29 U.S.C. §§ 201 *et seq.*, by paying less than the federal minimum wage,
14 failing to pay employees who worked in excess of 40 hours per week at a rate of one-and-a-half
15 times the regular rate at which they were employed, and failing to keep and preserve accurate
16 records of employees and the wages, hours and other conditions of employment maintained by
17 them. *Id.* DirecTV’s liability to AIS’s installers was entirely dependent on whether or not
18 DirecTV’s control over them was so pervasive as to render AIS a mere labor contractor for
19 DirecTV, the de facto employer—and therefore, liable as a joint employer under the FLSA for
20 wages owed. *See id.*

21 DirecTV fought discovery on the “joint-employer” issue, arguing that it was entitled to
22 a protective order to prevent disclosure of the details of its relationship with AIS, including the
23 manner in which it paid AIS’s workers. *See* Dkt. # 80 at 9-10. Over the Department’s
24 objection, this Court granted DirecTV’s motion for a protective order. *Id.* at 10. This Court
25 agreed with the Department that the “method of payment between potential joint employers is
26 often relevant to the [FLSA] analysis . . . ” (citing, *inter alia*, *Bonnette v. California Health and*
27

1 Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983)), and “[t]hus, the inquiry into the
2 methods of payments between DIRECTV and AIS could lead to admissible evidence in this
3 matter.” *Id.* at 9. But this Court also found “it is not unreasonable to require an order
4 protecting those documents and/or information which could reveal proprietary information.
5 Accordingly, the parties are directed to meet and confer regarding the scope of such protective
6 order and resubmit a proposed protective order for the court's consideration.” *Id.* at 10.

7 **The Protective Order.** Two months later, the parties submitted a “Stipulated
8 Protective Order.” Dkt. # 86. The protective order defines “proprietary material” as
9 information that “(i) derives independent economic value, actual or potential, from not being
10 generally known to, and not being readily ascertainable by proper means by, other persons who
11 can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are
12 reasonable under the circumstances to maintain its secrecy.” *Id.* at ¶2. Included within its
13 scope are copies, extracts, and summaries such information or communications that reveal
14 proprietary material. *Id.*

15 By its terms, the protective order “does *not* presumptively entitle parties to file
16 confidential information under seal.” *See id.* at ¶1 (emphasis added). Paragraph 6 of the
17 protective order provides that “any party or nonparty may challenge a designation of
18 confidentiality at any time.” *Id.* at ¶6. It further provides: “Unless a prompt challenge to a
19 designating party’s confidentiality designation is necessary to avoid foreseeable, substantial
20 unfairness, unnecessary economic burdens, or a significant disruption or delay of the litigation,
21 a party does not waive its right to challenge a confidentiality designations by electing not to
22 mount a challenge promptly after the original designation is disclosed.” *Id.*

23 **The Joint Stipulated Motion to Seal Exhibits.** Four months after entry of the
24 Stipulated Protective Order, the parties filed a two-page stipulated motion to seal summary
25 judgment exhibits. Dkt. # 115. Aside from citing to the stipulated protective order, the motion
26 contains only the following statement in support of the request for a sealing order:
27

1 DirecTV states that the documents it has produced in discovery,
2 including but not limited to DIRECTV's pricing information and
3 matrices containing performance metrics and other compilations
4 of data pertaining to the manner in which DIRECTV measures
5 productivity and customer satisfaction, are proprietary because
6 the information contained therein derives independent economic
7 value, actual or potential, from not being generally known to, and
8 not being readily ascertainable by proper means by, other persons
9 who can obtain economic value from its disclosure or use. In
10 order to abide by the terms of the Protective Order the Secretary
11 and Martinez also request the sealing of the exhibits.

12 *Id* at 2. No showing was made of a compelling need for secrecy, or that the parties had
13 explored redactions or other alternatives to filing under seal.

14 **The Order Granting Stipulated Motion to Seal Exhibits.** Six days later, this Court
15 granted the joint stipulated motion to seal, citing the parties' stipulated protective order. Dkt.
16 # 133. This Court made no findings as to whether DirecTV's need for secrecy, if any, rose to
17 the level of a "compelling reason" that outweighed the public interest in these court records.
18 This Court also made no findings as to whether a lesser remedy, such as narrowly-tailored
19 redactions, would adequately protect DirecTV's interests.

20 **The Cross Motions for Summary Judgment.** The Department moved for partial
21 summary judgment on the joint employer issue in March 2015. Dkt. # 121. DirecTV cross
22 moved for summary judgment. Dkt. # 126. Of the attached exhibits, 21 were sealed pursuant
23 to this Court's March 15, 2015 order. Dkts. # 116 -120, 130, 131, 143, 144, 147, and 148.¹ *See*
24 *also* Terrell Decl., Ex. 1. Despite being sealed, many exhibits were quoted directly and at
25 length by the Department in its briefing. Several exhibits were sealed despite the fact that
26 identical or substantially identical documents from DirecTV are publically available elsewhere
27 in the record or accessible online.²

¹ The exhibits sealed at Dkts. # 130 and 131 appear identical to those sealed at Dkts. # 147 and 148.

² For example, Exhibit B (contract between DirecTV and AIS) is entirely sealed; Exhibit II (contract between DirecTV and a California service provider, which the Department alleges is substantially identical to the contract between DirecTV and AIS) is entirely unsealed. *See* Terrell Decl., Ex. 2. Similarly, Exhibit M (DirecTV's Installer Manual) is entirely sealed; the 2011 version of the same manual is available in its entirety online. *See* Terrell Decl., Ex. 3.

The Court’s Order on Cross Motions for Summary Judgment. Ultimately, this Court found DirecTV was a joint employer for the purposes of the claims in this case. Dkt. # 158. In so holding, this Court relied extensively and frequently on the exhibits to the parties’ cross-motions for summary judgment. *Id.* Of those exhibits, 21 were and remain sealed.

III. ARGUMENT AND AUTHORITY

A. The Summary Judgment Exhibits Were Sealed In Violation Of The Public's Common Law And First Amendment Rights Of Access.

1. Both The Common Law And The First Amendment Create A Presumptive Public Right Of Access To Court Records.

Both the Supreme Court and Ninth Circuit recognize a common law right of the public “to inspect and copy public records and documents, including judicial records and documents.” *Nixon*, 435 U.S. at 597 & n.7; *Kamakana*, 447 F.3d at 1178. Unless a document is of the type “traditionally kept secret”—such as a grand jury transcript or a pre-indictment warrant—there is “a strong presumption in favor of access” to court records. *Kamakana*, 447 F.3d at 1178 (internal quotation marks omitted). This presumption can be overcome only if the party seeking to seal the record “‘articulate[s] compelling reasons supported by specific factual findings’ that outweigh the general history of access and the public policies favoring disclosure.” *Id.* (quoting *Foltz*, 331 F.3d at 1135).

This common-law right of access has been recognized as especially important in cases where the government is a party. *See, e.g., E.E.O.C. v. Election Co., Inc.*, 900 F.2d 168, 170 (9th Cir. 1990) (reversing district court order sealing government consent decree). *See also FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir.1987) (“The appropriateness of making court files accessible is accentuated in cases where the government is a party: in such circumstances, the public’s right to know what the executive branch is about coalesces with the concomitant right of citizenry to appraise the judicial branch.”); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1178–79 (6th Cir.1983) (noting that civil cases frequently involve issues crucial to the public such as discrimination claims, and the remedies and

1 penalties “imposed by the court will be more readily accepted, or corrected if erroneous, if the
2 public has an opportunity to review the facts presented to the court.”).

3 In addition to this common law right of access, the First Amendment protects the
4 public’s right of access to the court records in this case. The Ninth Circuit recently joined
5 several other courts of appeals in holding that the First Amendment right of access to court
6 records applies to civil as well as criminal proceedings. *See Courthouse News Serv. v. Planet*,
7 750 F.3d 776, 786-78 (9th Cir. 2014) (citing cases from other circuits); *Wood v. Ryan*, 759 F.3d
8 1076, 1081-82 (9th Cir. 2014), *vacated on other grounds*, 135 S. Ct. 21(2014) (“[W]e recently
9 acknowledged the First Amendment right of access to civil proceedings and associated records
10 and documents.” (internal quotation marks omitted)). The First Amendment standard is even
11 more demanding than that under the common law right of access. A party seeking to seal
12 documents must demonstrate not only a “compelling interest” in sealing, but also a “high
13 probability” that this interest would be harmed if the documents were disclosed and that “there
14 are no alternatives to closure that would adequately protect the compelling interest.” *Perry v.*
15 *Brown*, 667 F.3d 1078, 1088 (9th Cir. 2012) (internal quotation marks omitted).

16 2. The “Compelling Reasons” Standard Applies With Full Force To The Sealed
17 Documents At Issue, Notwithstanding The Protective Order.

18 There is no question that the foregoing standards apply to the summary judgment
19 exhibits sealed in this case. It has long been the law in this Circuit—and elsewhere—that the
20 public’s right of access to court records applies with full force “to materials submitted in
21 connection with motion for summary judgment in civil cases[.]” *San Jose Mercury News v.*
22 *U.S. Dis. Court-N. Dist. (San Jose)*, 187 F.3d 1096, 1102 (9th Cir. 1999). *See also Foltz*, 331
23 F.3d at 1136 (applying right of access to attachments to summary judgment pleadings produced
24 in discovery in reliance on stipulated umbrella protective order).

25 The Ninth Circuit’s decision in *Kamakana* is directly on point. There, a newspaper
26 moved to intervene for the limited purpose of modifying a protective order and unsealing
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1 summary judgment pleadings. 447 F.3d at 1176. After conducting an in camera review, the
2 magistrate judge ordered the records unsealed.

3 The Ninth Circuit affirmed. The Court began by reaffirming “that the strong
4 presumption of access to judicial records applies fully to dispositive pleadings, including
5 motions for summary judgment and related attachments.” *Id.* at 1179. “[T]his principle of
6 disclosure,” the Court explained, is animated by the understanding that “the resolution of a
7 dispute on the merits, whether by trial or summary judgment, is at the heart of the interest in
8 ensuring the ‘public understanding of the judicial process and have significant public events.’”
9 *Id.* (citation omitted). “Thus,” the Ninth Circuit concluded, “compelling reasons” must be
10 shown to seal judicial records attached to a dispositive motion.” *Id.*

11 This is true, moreover, “even if the dispositive motion, or its attachments, were
12 previously filed under seal or protective order.” *Id.* Relying on *Foltz*, the *Kamakana* Court
13 explained that a showing of “good cause” to seal documents during discovery “will not,
14 without more, satisfy a ‘compelling reasons’ test.” *Id.* at 1180. The Court reasoned that private
15 materials unearthed during discovery implicate only the private interests of individuals,
16 whereas “judicial records are public documents almost by definition, and the public is entitled
17 to access by default[, which] sharply tips the balance in favor of production when a document,
18 formerly sealed for good cause under Rule 26(c), becomes part of the judicial record.” *Id.*
19 (internal citations omitted).

20 *Foltz*, on which *Kamakana* relied, is also instructive. There, following settlement of a
21 fraud action against State Farm Insurance Company, a public interest group sought public
22 access to sealed summary judgment pleadings. State Farm objected on the ground that it had
23 produced the sealed documents in reliance on a pretrial protective order. *Foltz*, 331 F.3d at
24 1137. The Ninth Circuit rejected this argument, holding that “[b]ecause State Farm obtained
25 the blanket protective order without making a particularized showing of good cause with
26 respect to any individual document, it could not reasonably rely on the order to hold these
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1 records under seal forever.” *Id.* at 1138. *Foltz* concluded that the district court “must remove
2 the seal . . . unless it can find sufficiently compelling reasons for maintaining a seal over
3 particular documents.” *Id.*

4 3. DirecTV Never Articulated Any Compelling Reasons To Justify Sealing The
5 Records In This Case.

6 There is no indication that DirecTV ever demonstrated—or that this Court ever found—
7 “compelling reasons supported by specific factual findings,” for sealing the summary judgment
8 exhibits in this case as required in the Ninth Circuit. *See Kamakana*, 447 F.3d at 1178. The
9 sole basis for sealing the records was that they allegedly contained information designated
10 proprietary pursuant to the parties’ stipulated protective order. But the mere existence of a
11 stipulated pretrial protective order is insufficient to justify sealing court records. *See, e.g., id.* at
12 1180 (“[a] ‘good cause’ showing will not, without more, satisfy a ‘compelling reasons’ test.”);
13 *San Jose Mercury News*, 187 F.3d at 1102 (noting that “blanket [protective] orders are
14 inherently subject to challenge and modification, as the party resisting disclosure generally has
15 not made a particularized showing of good cause with respect to any individual document.”).
16 *See also Yountville Inv’rs, LLC v. Bank of AM., N.A.*, No. C-08-425RSM, 2009 WL 411089, at
17 *1 (W.D. Wash. Feb. 17, 2009) (“The Court will not grant broad authority to file documents
18 under seal simply because the parties have designated them as confidential in the course of
19 discovery.”).

20 But even if a stipulated protective order could justify the sealing of court records, this
21 protective order, by its own terms, could not. The order expressly stated that it “does *not*
22 presumptively entitle parties to file confidential information under seal.” Dkt. # 86 at 1
23 (emphasis added). Despite this provision, the parties’ Joint Stipulated Motion to Seal merely
24 recited the fact that the summary judgment exhibits contained material designated confidential
25 pursuant to the protective order as the principal justification for the wholesale sealing of the
26 records. *See* Dkt. # 115.

1 The only other proffered justification for the sealing order was that the exhibits contain
2 “pricing information,” “matrices,” and “other compilations of data” pertaining to how DirecTV
3 “measures productivity and customer satisfaction.” Dkt. # 115 at 2. This information, claimed
4 DirecTV, is “propriety” because it “derives independent economic value” from “not being
5 generally known to . . . other persons who can obtain economic value from its disclosure or
6 use.” *Id.* Contrary to DirecTV’s assertion, such vague allegations fail to justify a discovery
7 protective order, much less sealing court records. As the Ninth Circuit held in *Foltz*, even
8 under the relatively lenient “good cause” standard applicable to discovery materials, “broad
9 allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not
10 satisfy the Rule 26(c) test.” 331 F.3d at 1130 (quoting *Beckman Indus., Inc. v. Int’l Ins. Co.*,
11 966 F.2d 470, 476 (9th Cir. 1992)). Plainly, such allegations fall well short of what is required
12 for the sealing of summary judgment pleadings. *See Center for Auto Safety v. Chrysler Grp.*,
13 809 F.3d 1092, 1096-97 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 38 (2016) (quoting *Kamakana*,
14 447 F.3d at 1179) (“[A] court may seal records only when it finds ‘a compelling reason and
15 articulate[s] the factual basis for its ruling, without relying on hypothesis or conjecture.”
16 (emphasis added)).³

17 Further, even if DirecTV had demonstrated compelling reasons for some level of
18 secrecy (it did not), the parties made no effort to explain why redaction of the documents could
19 not protect DirecTV’s proprietary interests while at the same time allowing the public some
20 level of access to the documents in question. The First Amendment prohibits the sealing of
21 court records unless it is shown that “there are no alternatives to closure that would adequately
22 protect the compelling interest.” *Perry*, 667 F.3d at 1088 (internal quotation marks omitted).
23 *See also Foltz*, 331 F.3d at 1137 (“[w]e do not see how the presence of a small number of
24

25 ³ Although a discovery protective order could never, standing alone, justify the sealing of court records, it is worth
26 noting that many of the sealed exhibits do not even appear to fall within the scope of the parties’ protective order,
27 because they do not meet the definition of “proprietary” or trade secret information. For example, many exhibits
relate to installer scheduling and leave issues; the information in other exhibits—or substantively identical
information—is publically available online and elsewhere in the record. *See Terrell Decl.*, Ex. 1-3.

1 third-party medical and personnel records that can be redacted with minimum effort constitutes
2 ‘good-cause,’ let alone a compelling reason, for this protective order to overcome the strong
3 presumption in favor of public access.”). In keeping with this standard, Local Rule 5(g)(3)(A)
4 obligates parties moving to seal documents with this court to certify that they “explore[d]
5 redaction and other alternatives to filing under seal.” Yet it appears that no such effort was
6 made in this case.⁴ This fact, too, renders the sealing of the summary judgment exhibits fatally
7 flawed.

8 In sum, neither the law nor the parties’ protective order permit sealing these summary
9 judgment exhibits. Not only was there no showing of a compelling need for secrecy, but there
10 were no findings to justify the sealing order. *See Kamakana*, 447 F.3d at 1182 (“[w]hen
11 *sealing* documents attached to a dispositive pleading, the district court must base its decision on
12 a compelling reason and articulate the factual basis for its ruling, without relying on hypothesis
13 or conjecture.”) (emphasis in original; internal citation and quote omitted).

14 **B. The Documents Should Be Unsealed Without Delay.**

15 Several courts have “emphasize[d]” that “where a right of access is found,” access
16 should be granted “immediate[ly].” *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 126
17 (2d Cir. 2006) (collecting cases). Because court records are public by default, the sealed filings
18 should be unsealed as soon as this Court determines that there is no valid basis for keeping
19 them secret. The Court “need not document compelling reasons to unseal; rather the proponent
20 of sealing bears the burden [to demonstrate that sealing is proper]. A failure to meet that
21 burden means that the default posture of public access prevails.” *Kamakana*, 447 F.3d at 1181-
22 82.

23 Delay in permitting access to court records impairs not only the right of access itself,
24 but also the right of free speech. In *Courthouse News*, a news organization challenged a court’s
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26 ⁴ Because many sealed exhibits were quoted directly and at length in the Department’s summary judgment motion,
27 narrowly-tailored redaction would seem sufficient to protect the information (if any) for which there was a
compelling reason for secrecy. *See* Dkt. # 121; Terrell Decl., Ex. 1.

1 refusal to give the organization same-day access to civil complaints. 750 F.3d at 789. The
2 district court abstained and dismissed the lawsuit because of pending state court litigation about
3 a state law that also provided a right of access to court records. *See id.* The Ninth Circuit held
4 that abstention was improper because it would delay adjudication of the organization's right to
5 access court records. *See id.* at 793. The court explained that delay could "harm[] [the
6 organization's] free speech interests" by "prevent[ing] it from engaging in protected activity"—
7 in that case, reporting on new lawsuits. *Id.* at 788.

8 IV. CONCLUSION

9 For the foregoing reasons, movant the Washington Wage Claim Project requests that all
10 the sealed documents in this case be immediately unsealed and made available to the public
11 unless (a) the parties can demonstrate compelling reasons for secrecy that outweigh the public's
12 presumptive right of access to court records; and (b) the Court finds that there are no
13 alternatives to closure that would adequately protect the parties' compelling interest in secrecy.

14 RESPECTFULLY SUBMITTED AND DATED this 24th day of March, 2017.

15
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CERTIFICATE OF SERVICE

I, Beth E. Terrell, hereby certify that on March 24, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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